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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**

8 LEE J. WARE, an individual, and
9 IRMA WARE, an individual,

10 Plaintiff,

11 vs.

12 BAYVIEW LOAN SERVICING,
13 LLC, AZTEC FORECLOSURE
14 CORPORATION, and DOES 1-100,
inclusive,

15 Defendants.

CASE NO. 13-CV-1310 JLS (NLS)

**ORDER DISSOLVING AUGUST 16,
2013 ORDER AND GRANTING *EX*
PARTE MOTION TO DISSOLVE
PRELIMINARY INJUNCTION**

(ECF No. 26)

16 Presently before the Court is Defendant Bayview Loan Servicing, LLC's
17 ("Bayview") *ex parte* motion to dissolve this Court's August 16, 2013 Preliminary
18 Injunction Order. (ECF No. 26.) For the reasons stated below, the Court **DISSOLVES**
19 its August 16, 2013 Order and **GRANTS** Bayview's request to dissolve the preliminary
20 injunction.

21 **BACKGROUND**

22 Plaintiffs Lee J. Ware and Irma Ware ("Plaintiffs") bring this action against
23 Defendants Bayview and Aztec Foreclosure Corporation ("Defendants") asserting four
24 causes of action: (1) violations of California Civil Code § 2923.6; (2) violations of
25 California Business and Professions Code § 17200 et seq.; (3) negligence; and (4)
26 accounting. (Compl., ECF No. 1-1.)

27 This action concerns the disputed ownership and loan status of the property at
28 8248 Rockview Drive, El Cajon, CA 92021 (the "Property"). Sometime in 2007,

1 Plaintiffs entered into a written loan agreement for the sum of \$330,000, secured by a
2 deed of trust to the Property. (ECF No. 4 at 9.) Subsequently in 2010, Plaintiffs failed
3 to make all payments required under the loan agreement. (*Id.* at 9-10.) Around this
4 time, Plaintiffs applied for a loan modification with Virtual Bank. (*Id.* at 11.) Plaintiffs
5 were allegedly informed that no foreclosure activity would take place while their
6 application was in review. (*Id.* at 10.)

7 On or around April 4, 2011, Defendants allegedly executed a Notice of Default
8 and Election to Sell Under Deed of Trust (“NOD”) on the Property. (ECF No. 4-1.)
9 At this time, Plaintiffs' loan modification was allegedly “in review.” (ECF No. 4 at 11.)
10 Virtual Bank allegedly made representations to Plaintiffs at this time that the loan
11 modification was “imminent.” (*Id.*)

12 In or around July 2011, Plaintiffs filed for Chapter 13 bankruptcy. (*Id.* at 12.)
13 A Chapter 13 Plan was confirmed in or around February 2012. In or around October
14 2012, Sabadell United Bank, N.A., as Receiver for Virtual Bank, filed a motion for
15 relief from stay. (*Id.*) This motion was granted on or about February 12, 2013. (*Id.*)

16 On March 13, 2013, foreclosure trustee Aztec Foreclosure Corporation recorded
17 a Notice of Trustee's Sale (“NOS”), setting the foreclosure sale date for April 3, 2013.
18 (ECF No. 4-3.) At this time, Virtual Bank allegedly advised Plaintiffs that a short sale
19 was Plaintiffs' best option, and Plaintiffs submitted an application for a short sale on
20 or around March 18, 2013. (ECF No. 4 at 12-13.)

21 On April 3, 2013, Plaintiffs received a letter informing them that Bayview, acting
22 as agent on behalf of Virtual Bank, would review Plaintiffs' request to be offered a
23 foreclosure alternative. On or about April 9, 2013, Plaintiffs received a letter from
24 Bayview stating that Plaintiffs were ineligible for their foreclosure prevention programs
25 because a short sale had not been approved by an investor or group of investors. (ECF
26 No. 4-4.) On or about April 15, 2013, Plaintiffs received a notice that the foreclosure
27 sale had been postponed to May 14, 2013. (ECF No. 4-5.) Plaintiffs were allegedly
28 unable to make any constructive contact with Defendants regarding their short sale

1 denial or any potential alternative options to avoid foreclosure. (ECF No. 4 at 14.) On
2 May 8, 2013, Plaintiffs sent a letter to Defendants informing them of a material change
3 in their financial circumstances. (ECF No. 4-6.)

4 On May 9, 2013, Plaintiffs filed the underlying complaint. (ECF No. 1-1.) On
5 June 6, 2013, Defendants removed the action from the Superior Court of California for
6 the County of Los Angeles, alleging diversity jurisdiction. (ECF No. 1.) On June 13,
7 2013, Plaintiffs filed an *ex parte* motion for a temporary restraining order (“TRO”)
8 (ECF No. 4) enjoining Bayview from taking any steps to deprive Plaintiffs from
9 residing on the Property until the Court could hold a preliminary injunction hearing,
10 which this Court granted (ECF No. 8).

11 At the June 27, 2013 preliminary injunction hearing, the Court determined that
12 further briefing by both parties was necessary to address several issues, including
13 whether Plaintiffs’ 2011 loan modification application was still pending. (ECF No. 15.)
14 Accordingly, the Court issued an Order continuing the hearing to August 15, 2013, and
15 setting a briefing schedule for supplemental briefing. (*Id.*) (ECF No. 22.)

16 Following the August 15, 2013 hearing, the Court issued an Order dissolving the
17 TRO and granting Plaintiffs’ request for a preliminary injunction. (ECF No. 25.) The
18 Court further ordered Plaintiffs to pay a \$39,799.00 bond within seven days of the
19 docketing of the Order.¹ (*Id.*) On August 29, 2013, Bayview filed the present *ex parte*
20 motion to dissolve this Court’s Preliminary Injunction Order, on the grounds that
21 Plaintiffs had not paid the bond. (ECF No. 26). Plaintiffs have not opposed Bayview’s
22 motion, nor have they since posted their bond.

23 LEGAL STANDARD

24 “There is no dispute but that a sound judicial discretion may call for the
25 modification of the terms of an injunction decree if the circumstances, whether of law
26 or fact, obtaining at the time of its issuance have changed, or new ones have since
27

28 ¹The Order was docketed on August 16, 2013, and therefore Plaintiffs were
required to post their bond on or before August 23, 2013.

1 arisen.” *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 859 (9th Cir. 2004) (quoting
 2 *Sys. Fed’n No. 91, Ry. Emps.’ Dept. v. Wright*, 364 U.S. 642, 647 (1961)). This
 3 discretion to modify or dissolve a preliminary injunction is broad. *Santos v. Reverse*
 4 *Mortg. Solutions, Inc.*, No. 12-3296-SC, 2012 WL 4891597, at *7 (N.D. Cal. Oct. 12,
 5 2012) (citing *Mariscal-Sandoval*, 370 F.3d at 859). While “[f]irmness and stability
 6 must no doubt be attributed to continuing injunctive relief based on adjudicated facts
 7 and law,” changed circumstances may nevertheless turn a preliminary injunction into
 8 “an instrument of wrong.” *Sys. Fed’n No. 91*, 364 U.S. at 647 (quoting *United States*
 9 *v. Swift & Co.*, 286 U.S. 106, 114-15 (1932)).

10 Under the Federal Rules of Civil Procedure, “[t]he court may issue a preliminary
 11 injunction or temporary restraining order only if the movant gives security in an amount
 12 that the court considers proper to pay the costs and damages sustained by any party
 13 found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c); *see also*
 14 *Grady v. Bank of Elmwood*, No. CV 11-2060-PHX-JAT, 2012 WL 1132578, at *3 (D.
 15 Ariz. Apr. 4, 2012). Although the court may in its discretion decline to order the
 16 payment of a bond (despite the seemingly mandatory nature of Rule 65(c)’s language),
 17 *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011), this Court has already ordered
 18 Plaintiffs to pay a bond in the amount of \$39,799.00 by August 23, 2013. (*See* ECF No.
 19 25.) The failure to pay a bond required by court order has been found to constitute
 20 changed circumstances meriting the dissolution of a preliminary injunction. *See, e.g.*,
 21 *Castillo v. Skoba*, No. 10CV1838 BTM, 2011 WL 92991 (S.D. Cal. Jan. 7, 2011)
 22 (Moskowitz, J.); *Grady*, 2012 WL 1132578.

23 ANALYSIS

24 The facts have changed since the issuance of the August 16, 2013 Preliminary
 25 Injunction Order. This Court ordered Plaintiffs to post a bond, but the deadline by
 26 which Plaintiffs were to have posted that bond has long passed. Moreover, Plaintiffs
 27 have not bothered to respond to Bayview’s *ex parte* motion requesting dissolution of
 28 the preliminary injunction with any justifications for this failing. In light of Plaintiffs’

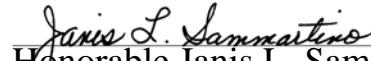
1 failure to comply with this Court's Order, and without a bond to serve as security
 2 should this Court ultimately determine that Bayview has been wrongfully enjoined, the
 3 Court fears that its preliminary injunction has become an "instrument of wrong" by
 4 enabling further delay in the resolution of this matter. *Sys. Fed'n No. 91*, 364 U.S. at
 5 647. Accordingly, this Court **GRANTS** Bayview's request to dissolve the Preliminary
 6 Injunction Order.²

7 **CONCLUSION**

8 For the reasons stated above, the Court **DISSOLVES** its August 16, 2013 Order
 9 and **GRANTS** Bayview's request to dissolve the preliminary injunction.

10 **IT IS SO ORDERED.**

11
 12 DATED: September 18, 2013

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 14 Honorable Janis L. Sammartino
 United States District Judge

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²Of course, as of January 1, 2013, the Homeowner's Bill of Rights ("HBOR")
 25 provides that "if a borrower submits a complete application for a first lien loan
 26 modification . . . the mortgage servicer . . . shall not record a notice of default or notice
 27 of sale, or conduct a trustee's sale, while the complete first lien loan modification
 28 application is pending." Cal. Civ. Code § 2923.6(c). This Court's concerns regarding
 Bayview's failure to provide factual support that it denied Plaintiffs' 2011 loan
 modification application in accordance with the HBOR, expressed in the August 16,
 2013 Preliminary Injunction Order, remain. (*See* ECF No. 25 at 6-8.) The Court
 cautions the parties that this dissolution of the preliminary injunction does not alter that
 fact.